

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LESLIE G. KINNEY,

Plaintiff,

v.

CENTRAL INTELLIGENCE AGENCY,

Defendant.

CASE NO. C16-5777

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANT'S MOTION FOR
RELIEF

This matter comes before the Court on the Central Intelligence Agency's ("Defendant") motion for relief from providing initial disclosures, conducting a discovery conference, and filing a joint status report. Dkt. 8. The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion in part and denies it in part for the reasons stated herein.

I. BACKGROUND

On September 12, 2016, Leslie G. Kinney ("Plaintiff") filed a complaint before this court. Dkt. 1. Plaintiff alleges that Defendant has wrongfully refused to provide information pursuant to a request under the Freedom of Information Act, 5 U.S.C. § 552 et seq. ("FOIA"). *Id.* On September 14, the Court issued an order regarding initial

1 disclosures, setting a deadline for the parties' discovery conference under Fed. R. Civ. P.
2 26(f), and requiring that the parties submit a joint status report. Dkt. 4. On December 20,
3 2016, Defendant answered the complaint. Dkt. 6.

4 On January 19, 2017, Defendant moved for relief from its obligations to provide
5 initial disclosures, conduct a discovery conference, or submit a joint status report. Dkt. 8.
6 On January 27, 2017, Plaintiff responded. Dkt. 9. On January 30, 2017, Defendant
7 replied. Dkt. 11.

8 II. DISCUSSION

9 Defendant requests that the Court discharge its duties of (1) conducting a
10 Discovery Conference and preparing a Joint Status Report as required by Fed. R. Civ. P.
11 26(f) and W.D. Wash. Local Rule LCR 16(a), and (2) providing initial disclosures as
12 required by Fed. R. Civ. P. 26(a)(1). *See* Dkt. The Court grants Defendant's motion in
13 part and denies it in part.

14 A. Discovery Conference and Joint Status Report

15 Although Defendant requests that it be relieved of conducting a discovery
16 conference or filing a joint status report, it fails to provide any basis upon which such
17 relief should be granted. In fact, the discovery conference required by Rule 26(f) is
18 specifically intended to contemplate the requirement of initial disclosures under Rule
19 26(a), in addition to any other protective orders or limitations that the Court should
20 consider under Rule 26(c). Fed. R. Civ. P. 26(f)(3)(A), (f)(3)(F). Rule 26(f) also requires
21 that the parties assess the "subjects on which discovery may be needed, when discovery
22 should be completed, and whether discovery should be conducted in phases" Fed. R.

1 Civ. P. 26(f)(3)(B). Moreover, Defendant lacks any basis to fear improper discovery prior
2 to discussing these issues with Plaintiff, as discovery is prohibited prior to the Rule 26(f)
3 conference. Fed. R. Civ. P. 26(d)(1). Had Defendant simply fulfilled its obligation to
4 confer with Plaintiff under Rule 26(f), it appears very likely that its concerns could have
5 been resolved without requiring any Court intervention. Accordingly, the Court denies
6 Defendant's request for relief from conducting a Rule 26(f) discovery conference and
7 filing a joint status report, as required by the Court's previous order. *See* Dkt. 4.

8 **B. Initial Disclosures**

9 Defendant also requests that the Court relieve the parties of their obligation to
10 provide initial disclosures under Federal Rule of Civil Procedure 26(a)(1). *See* Dkt. 8. To
11 support its motion, the Defendant cites Rule 26(a)(1)(B)(i). Plaintiff opposes the motion,
12 arguing that this case is not exempt from initial disclosures because Rule 26(a)(1)(B)(i)
13 does not apply to FOIA claims. *See* Dkt. 9.

14 Regarding the applicability of Fed. R. Civ. P. 26(a)(1)(B)(i), the Court agrees with
15 Plaintiff. Defendant has failed to provide, and the Court is unaware of, any authority to
16 suggest that FOIA claims are exempt from initial disclosures as "an action for review of
17 an administrative record." Fed. R. Civ. P. 26(a)(1)(B)(i). Also, Defendant has failed to
18 show, or even allege, that FOIA requests generate an administrative record from which a
19 plaintiff could appeal. Nonetheless, an action may be "exempted [from the initial
20 disclosure requirement] by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the
21 court." Fed. R. Civ. P. 26(a)(1)(A) (emphasis added). The Court has "wide latitude in
22 controlling discovery." *Lane v. Dep't of Interior*, 523 F.3d 1128, 1134 (9th Cir. 2008).

1 While this issue could easily have been resolved by the parties upon stipulation
2 had Defendant properly participated in a Rule 26(f) conference, it is presently before the
3 Court. Both parties have been afforded an adequate opportunity to address whether initial
4 disclosures are appropriate. Therefore, having reviewed the parties' briefs, the Court
5 grants Defendant's motion for relief from the Rule 26(1)(a) initial disclosure requirement.

6 It is well established that "in FOIA and Privacy Act cases discovery is limited
7 because the underlying case revolves around the propriety of revealing certain
8 documents." *Lane*, 523 F.3d at 1134. In this case, in order to identify a specified
9 individual as an intelligence source for the CIA, Plaintiff seeks potentially classified CIA
10 documents that are almost certainly exempt from FOIA disclosure. *See* 50 U.S.C.A. §
11 3024(g)(1)(D); 5 U.S.C. § 552(b)(3), (b)(5). Although Plaintiff is correct that the
12 requested documents are likely quite old, the mere passage of time does not mean that
13 these documents are no longer exempt from FOIA requests. *Berman v. C.I.A.*, 501 F.3d
14 1136, 1145 (9th Cir. 2007). Therefore, because this case potentially implicates highly
15 sensitive information, and because it is likely to be resolved on summary judgment, the
16 Court finds it prudent to relieve Defendant of its initial disclosure obligations under Rule
17 26(a). To the extent that discovery may be required prior to summary judgment in order
18 to "investigate the scope of the agency search for responsive documents," *see Pub.*
19 *Citizen Health Research Group v. F.D.A.*, 997 F. Supp. 56, 72 (D.D.C. 1998), the parties
20 shall discuss this (and any similar) issue in their 26(f) conference. *See* Fed. R. Civ. P.
21 26(f)(3)(B).
22

1 **III. ORDER**

2 Therefore, it is hereby **ORDERED** that Defendant's motion (Dkt. 8) is
3 **GRANTED in part** and **DENIED in part**. Defendant is relieved from its obligation to
4 provide initial disclosures. The parties shall promptly conduct a discovery conference
5 pursuant to Fed. R. Civ. P. 26(f) and submit a joint status report as previously ordered by
6 the Court. *See* Dkt. 4.

7 Dated this 22nd day of February, 2017.

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10 BENJAMIN H. SETTLE
United States District Judge